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The overflowed liberal norm: a Brazilian contribution to the anthropology of law by Luís Roberto Cardoso de Oliveira

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Honorary Professor (*Directeur d'études*) at the École des Hautes Etudes en Sciences Sociales, Paris. Following his research on “social coding” and “investment in (conventional) forms” that contribute to the coordination of economic and social action, he co-authored with Luc Boltanski *On Justification* (2006 [1991]), which analyzes the most legitimate repertoires of evaluation governing political, economic and social relationships. The book has been influential in the new French social sciences (“Pragmatic sociology”) and in “Convention Theory”, a strand of Institutional Economics and Economic Sociology. In his further work (*L'action au pluriel: Sociologie des régimes d'engagement*, 2006), he offered an extension of the analytical framework of justification to deal with a plurality of ways people *engage with* the material environment and with others, from intimacy to the level of public conventions. This development has led to a critical approach to present day “governance by standards and objectives” and, in sustained cooperation with law scholars, of *Modes of normativity and normative transformations* (co-edited with Véronique Champel-Desplats and Jérôme Porta, Paris, L.G.D.J., 2020). This sociology of conventions and engagements has informed collaborative international programs comparing architectures of communities in Western Europe (*European Journal of Cultural and Political Sociology*, special issue on “Politics of Engagement in an Age of Differing Voices”, co-edited with Eeva Luhtakallio, 2018, 5(1-2)), Russia (*Revue d'Etudes Comparatives Est-Ouest*, special issue on “Critiquer et agir en Russie”, co-edited with Françoise Daucé et Kathy Rousselet, 2017, 48(3-4)) and the United States (*Rethinking Comparative Cultural Sociology: Repertoires of Evaluation in France*, co-edited with Michèle Lamont, Cambridge University Press, 2000).

Hyphenating morality (*Moralität*), ethical life (*Sittlichkeit*) and abstract right (*Recht*): Brazilian anthropological insight into the limits of liberalism

From an international perspective, the work of Professor Luís Roberto Cardoso de Oliveira is of first importance because of the object and the method. The text under discussion provides a synthetic view of his research which benefits the analysis of conflict management, the theme of the CAJU (Laboratory of Studies of Citizenship, Conflict Management and Justice) laboratory which he leads at the University of Brasilia, as well as of the vast network of InEAC (National Institute of Science and Technology of Comparative Studies in Conflict Management). These centers of research and collective learning demonstrate the strength of the anthropology of law developed in Brazil, that is widely open to other disciplines including, in addition to law, political and moral philosophy, political science and sociology. This anthropology does not only shed an outstanding light on the Brazilian situation; it also provides a general contribution to the anthropology of law, politics and morality from a comparative perspective covering North America, Europe and Brazil. Luís Roberto's research clarifies an issue which, although shared by the countries of the so-called global North and South, often divides them. I called it "The overflowed liberal norm" because of the various senses of the term "overflow". It means extensions beyond the limits of what this normative order frames, the profusion of modes of normativity that this order cannot contain, and possibly – more clearly in the French term *débordement* – a violent attack. All of these three meanings are part of the topic, including the latter at a historical moment when democracies are once again revealing their vulnerability.

From the very beginning of his text, the author situates his questioning in the genealogy of political and moral liberalism considered from the formulation of the morality (*Moralität*) of the norm that would be valid without qualification and in all universality, to the difference, put forward by Kant, with contextual values. Luís Roberto reminds us of the criticism made by Hegel, which leads the latter to distinguish from this sphere of morality the sphere of abstract right (*Recht*), as well as the third sphere of ethical life (*Sittlichkeit*), including family, civil society and the State, and transcending the individual. Luís Roberto's argument on the needed articulation between these spheres is made visible by the hyphen joining ethical and moral, and the addition of the substantive "right" to this compound adjective. The wider use that the author gives to legal terms are favorable to this joining of the three spheres. It might result from differences between the Portuguese language of Brazil and the English – and sometimes French – language of North America, although the author has a perfect knowledge of all three. Thus, I wonder about the extension given by the author to the term "right", which goes beyond the sphere of abstract law (*Recht*) and the legal system by contrast to the French term "*droit*". Luís Robert is thus led to distinguish rights that are qualified as "legal" or "legally instituted" and he notes that "ethical-moral rights [...] cannot be fully embodied into formal law". The question also applies to the legal term "citizenship", which the author uses more widely than its legal definition to cover

the three types of situations he has studied, insofar as they are “unacceptable at the level of citizenship”: people in the United States who feel they are treated undignified by others and resort to the Small Claim Courts to compensate for an unhelpful legal system; people in Canada who feel they are treated undignified although they constitute the Quebec component of the country; people in Brazil who feel they are treated undignified by the justice system or the police. In these three configurations of perceived indignity and expressed indignation, it is not so much legal citizenship that is at issue as “the lack of attention or overt consideration shown to the interlocutor”, which is experienced as “a denial of the worth of the injured party and as an attempt by one of the parties to place the other party in an inferior condition” (Cardoso de Oliveira 2022). In these three situations, the “regard for person” (*acceptio personarum*) – a designation borrowed from Scripture to name a fault in justice – interferes with the law: the consideration of personal traits calls into question the equality of legal treatment. Luís Roberto’s analysis focuses on the confrontation between two formulas of normative treatment of the person, one based on traditions that make the honor of the person a common valuation, the other on liberal principles.

Honor, dignity, consideration, worth: concepts “that bridge self and society”

The relationship between these two formulas is often presented as a modern passage of the notion of honor which was distributed in a differentiated and unequal way in ancient society, into dignity which can be equally shared by all citizens. Luís Roberto quotes Peter Berger’s reference text on this subject, “On the Obsolescence of the Concept of Honour”, in which the latter wrote that “dignity, as against honor, always relates to the intrinsic humanity divested of all socially imposed roles or norms” as evidenced by the human rights which always pertain to the individual “‘irrespective of race, color or creed’—or, indeed, of sex, age, physical condition or any conceivable social status” (Berger 1970, 342). Berger links to this dignity of the divested human being “an implicit sociology [that] views all biological and historical differentiations among men as either downright unreal or essentially irrelevant” and an “implicit anthropology [that] locates the real self over and beyond all these differentiations” (id.), two normative orientations of the contemporary human sciences that underlie the dominant deconstructionism. Drawing from the Bible as well as from Sophocles, Berger adds that “the understanding that there is a humanity behind or beneath the roles and the norms imposed by society, and that this humanity has profound dignity, is not a modern prerogative”. It seems to me that the three notions brought together by Berger should be distinguished, however, and that the passage from honor to dignity would then be clarified. The liberal law format of individual human rights is not the ground of the deconstructionist critique, nor does it coincide with an older principle that can be called “common humanity”. The simple opposition between unequal honor and equal dignity does not help to illuminate their relationship, which Luís Roberto has carefully revisited in his work. Berger is more helpful for

Luís Roberto's analysis when he writes that

both honor and dignity are concepts that bridge self and society. While either pertains to the individual in a very intimate way, it is in relations with others that both honor and dignity are attained, exchanged, preserved or threatened" (Berger 343-44).

The two "bridges" pave the way from the intimacy of the person to a treatment in common needed to compose a community.

Contrasting but comparable ways of trans-forming the intimate into a format for commonality

To the simple opposition between the individualistic horizontality of the egalitarian notions of modern law and citizenship and the holistic and hierarchical verticality of traditional orders, we would rather substitute the comparison of two "bridges" between "self" and "society", one according to the traditional "honor", the other according to the modern "dignity". It helps to analyze the overflow of liberal right by other modes of normativity that involve the "regard for person". This supposes not to confuse with the intimate person the format of the "individual" which has been forged in the liberal political and moral tradition to constitute a mode of being in the plural common of a community. The term "dignity" risks masking, because of its polysemy shared with recognition, that the individual in question is far from being a naked person divested of any common form. On the contrary, this "individual" results from an operation of transformation of the most intimately personal preoccupations into common forms which allow the communication – in the sense of the setting in common – needed to express differing and difference. Luís Roberto illuminates the transformation into public "dignity", a passage from intimate recognition of the self to recognition of social esteem and, further, to legal recognition. This transformation involves drastic changes in the personal and mutual engagements of the person, leading either to a liberal individual in public or to a person who receives consideration in common.

In the three various configurations that the author has studied and pertinently brought together to carry out his original analysis, an indignation rises, aroused by a feeling of indignity. The movement proceeds from a primary emotion due to an offense so personal that it often remains silent or is expressed in physical violence, evading the argumentative discursive spaces. The intimate engagement of the person in a familiar dependence that provides self-confidence and ease – far from the engagement of the autonomous individual whose self-assurance is based on projecting oneself through the choice of an individual plan – (Thévenot 2022), when damaged by someone else, arouses a sentiment of resentment (Ferro 2007). This sentiment is particularly difficult to put into the judicial form of the grievance because, as Luís Roberto observes in the first case, in US Small Claim Courts, demands for reparation of insults often originate less in a clearly accomplished

action than in a perceived disposition or a felt intention. The harm is no less acute. In order for the intimately injured person to communicate with the stranger who has injured him or her, and possibly to gain public recognition of social esteem, Luís Roberto shows that it is first necessary to go through a mutual engagement in the presence of the offender stranger, which is conducive to the display of the offence and to “dialogical” expressions of appreciation and considerateness. The second case of Quebec highlights a comparable operation of transformation from the offending attack of the most intimate familiar that constitutes a bundle of personal attachments carried by a proper language. In this case, the transformation aims at a public recognition in law and requires engaging in justification in the name of the common good. The argument of the survival of the Quebec component of the country clashes with the liberal argument of the free individual choice of the school and of the language it practices. The third case of indignation in Brazil also starts from a personal sense of outrage at the way in which the most intimate part of the person, his or her skin color, place and way of life, has been demeaned by the police and the judiciary as the basis for a degrading treatment. Rather than arguing for the liberal right to uniform treatment stripped of “regard for person”, the plaintiffs argue for the consideration of their person, stressing “that they are workers and good people, also worthy of respect and considerateness” (quoted in Cardoso de Oliveira 2022).

Spheres and trans-formations

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I will come back in conclusion on the hyphens uniting the three spheres of ethics, morality and law, of which Professor Luís Roberto Cardoso de Oliveira has shown the interweaving. I suggested they might be linked within the trans-formative operation by which the most personal good, proper to the intimate engagement to oneself and to one’s familiar world – which has been damaged by an indignant treatment – changes format in order to be taken into mutual consideration in a face-to-face dialogue, and to be even more detached in order to be engaged in a publicly recognized qualification.

The public format of the liberal “individual” creates, like all forms of communalization including honor, an order of superiority with respect to the intimacy of the self which does not have access to this commonality. Such an order enters into tension with the principle of common humanity when the latter serves as a reference. In order to mitigate this tension in democratically oriented societies, rigorous requirements of the sense of justice aim at avoiding the substantialization of ordered qualities (Boltanski and Thévenot 2020). But it always remains within reach to suspend these requirements by breaches of the common humanity, and to return to a hierarchy of naturalized qualities erected as substances.

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